Nos. 18404-18408.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 18404

FIREMAN'S FUND INSURANCE COMPANY, *et al.*,
Appellants,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, *et al.*,
Appellees.

No. 18405

THE CITY OF LOS ANGELES,
Appellant,

vs.

FIRE ASSOCIATION OF PHILADELPHIA, *et al.*,
Appellees.

(Continued on Inside Cover)

OPENING BRIEF OF APPELLANT THE CITY OF LOS ANGELES.

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No. 18406

YACHT CENTRE, INC., *et al.*,

Appellants,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, *et al.*,

Appellees.

No. 18407

THE CITY OF LOS ANGELES,

Appellant,

vs.

D. R. GUSTAVESON, *et al.*,

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OPENING BRIEF OF APPELLANT THE CITY OF LOS ANGELES.

JURISDICTIONAL STATEMENT.

These cases were brought in the United States District Court for the Southern District of California, Central Division, by libellants to recover for damages to a number of small vessels, and, in Case No. 18406, for damage to a yacht mooring facility, after an underwharf pipeline at the Matson Terminal at Los Angeles Harbor separated and permitted over 1500 barrels of bunker oil to be discharged onto the harbor waters. [Transcript of Record, Case No. 18404, p. 2; No. 18405, p. 1; No. 18406, p. 2; No. 18407, p. 2; No. 18408, p. 2.]

In each case, respondent The City of Los Angeles, the owner of the underwharf pipeline facility, filed a petition under General Admiralty Rule 56 against respondent Ben C. Gerwick, Inc. builder of the facility, for clean-up expenses and indemnity and contribution in the event the City were held liable to the libellants. [Transcript of Record, Case No. 18404, p. 76; No. 18405, p. 13; No. 18406, p. 13; No. 18407, p. 21; No. 18408, p. 41.]

On May 2, 1962, the District Court entered a decree awarding libellants damages against the City of Los Angeles and denying the City any relief on its petition for affirmative relief. [Transcript of Record, Case No. 18404, p. 246; No. 18405, p. 46; No. 18406, p. 49; No. 18407, p. 54; No. 18408, p. 74.]

Jurisdiction was conferred in the District Court by Article III, Section 2, of the United States Constitution and Title 28 of United States, Code, Section 1333.

On August 1, 1962, the City of Los Angeles filed a notice of appeal in each of the cases. [Transcript

of Record, Case No. 18404, p. 272; No. 18405, p. 63; No. 18406, p. 69; No. 18407, p. 74; No. 18408, p. 93.]

This court's jurisdiction accordingly rests upon Title 28 of United States Code, Section 2107.

STATEMENT OF THE CASE.

The libellant vessel owners recovered a decree against the City of Los Angeles for damages to their vessels caused when an underwharf pipeline at a municipally owned wharf separated and oil spilled onto the waters. The city was denied its clean-up expenses, indemnity and contribution against the contractor which built the defective pipeline.

QUESTIONS PRESENTED.

(1) In the absence of any evidence regarding the status of the owners of vessels damaged by an oil spill from a city-owned pipeline, was the city liable to them for its failure to inspect and repair the defective pipeline or warn them of its defective condition?

(2) May a written contract of the City of Los Angeles made by its Board of Harbor Commissioners, be altered by an executed oral agreement?

(3) Can a city recover damages, contribution, and indemnity from a contractor for defective work performed under a contract if the employees of the city and the management of the contractor knew the work was defective but this fact was not made known to the board of the city which accepted the work?

(4) Are costs allowable for a proctor's docket fee for depositions of witnesses who appear and testify at the trial and for the original copies of depositions?

STATEMENT OF FACTS.

The Matson Terminal at Los Angeles Harbor is located at Berths 195 to 199 on the west bank of the east channel. [C. T. 181.]* The terminal facility includes a wharf and a pipeline system for loading bunker oil from inland points onto vessels moored at the wharf. The wharf, supported by pilings, runs along the shore line 2275 feet and extends out over the water 70 feet. The pilings were driven in rows set at right angles to the shore line. These rows, called "Bents" were spaced about 10½ feet apart. [C. T. 189.] At the Matson Terminal, the "Bents" were numbered consecutively commencing with Bent No. 27 at the south end of the wharf and concluding with Bent No. 247 at the north end. Locations along the wharf were identified with reference to Bent number. [Ex. 3, E, Tr. 1842-1843.]

The underwharf bunker line commenced at a manifold box inland from Bent No. 46-47 and went under the wharf at a point between these two bents. The line made a right angle turn to the north and continued, suspended under the wharf, to a point between Bents Nos. 225-226, where the line made a right angle turn toward the shore, continued 7½ feet, made a second right angle turn and continued suspended under the wharf, north 105 feet to a point between Bents Nos. 234-235, where the line made a third right angle turn and went through the bulkhead wall to its terminus. [Ex. E; C. T. 185.]

Eight-inch lateral lines, spaced about 120 feet apart, extended from the 10-inch line to the face of the wharf.

*C. T. refers to the Clerk's Transcript in Case No. 18404.

The laterals were equipped with a valve and a riser which were accessible from the top of the wharf. [C. T. 191.]

The wharf was constructed in three stages. [C. T. 188, 190.] The third stage consisted of the 340 foot section of the wharf between Bents Nos. 213 and 245, including that portion of the underwharf pipeline north of Bent No. 213. The third stage was built by Ben C. Gerwick, Inc., under Harbor Department Agreement No. 1101. This contract, awarded to Gerwick on its bid of $461,000, provided that the underwharf pipeline would be extended north of Bent 213 as described above. [Ex. CA.] Two of the plans incorporated in the contract were Drawings Nos. 6-522-3 [Ex. E] and 1-110-62. [Ex. F; Ex. CA, p. 41, Art. 116.]

Drawing No. 6-522-3 [Ex. E] was an "underground Piping Plan" and showed the location of the 10-inch oil line, a 6-inch oil line, and a 6-inch boat line, under the wharf. On each of the three lines, between Bents Nos. 220-223, was a rectangular symbol. Below the three lines was a notation "Pipe expansion joints —Dwg 1-110-62", with arrows pointing to each of the three symbols. The expansion joint for the 10-inch oil line was indicated to be between Bents Nos. 221-222.

Drawing 1-110-62 [Ex. F] was entitled "Oil, Molasses, & Boatline Details". One of the details shown was "Detail Special Pipe Clamp". The clamp consisted in part of two straps which hung from an assembly attached to the underside of the wharf. These straps encircled the pipe and the indicated interval of space between them was 3½ inches with a notation "Vary as required for 6-inch and 10-inch pipe". An arrow with the notation "Expansion joint" pointed to

the pipe between the two straps. On the right of the drawing was a list of 14 notes. Note 14 read: "Location of Expansion Joints on Dwg 6-522-3".

An expansion joint was required in the line to allow for the expansion and contraction of the pipeline and the place indicated on Drawing No. 6-522-3 [Ex. E] was a proper location. [R. T. 214, 329.] An expansion joint is so designed that the ends of pipe may move within the joint, but, because of positive stops, cannot withdraw from it. [R. T. 315.] A typical expansion joint is shown in Exhibit A-1.

The special pipe clamp detail shown on Drawing 1-110-62 [Ex. F] was ambiguous because there was no expansion joint available on the market that would fit within the indicated space of 3½ inches between the two straps. [R. T. 324, 338.]

Max A. Tingley was the superintendent and project engineer assigned to the job by Gerwick. [R. T. 1273.] His only previous experience with "expansion joints" had been to use a style 40 Dresser coupling modified by adding "ears" and "bolts". [R. T. 1275.] A style 40 Dresser coupling is not an expansion joint. The coupling consists of a sleeve which goes over the two ends of the pipe being coupled. The coupling is sealed by placing rings on either side of the sleeve and inserting threaded rods through holes in each of the rings, by tightening nuts on the rods, a gasket is compressed between the pipe and sleeve thus sealing the coupling. [R. T. 192.]

To prevent the ends of the pipe from withdrawing from the sleeve under pressure, the coupling is sometimes modified by welding anchor clips ("ears") on in

pairs on either side of the coupling. By inserting threaded rods through holes in the clips, and tightening nuts on the rods the movement of the pipe within the coupling could be limited and pipe prevented from withdrawing from the coupling. [R. T. 1887.] This modification is recommended to be used to alleviate expansion and contraction within a coupling. [R. T. 818], but not to modify a coupling for use as an expansion joint. [R. T. 808.]

At the outset of the job, Tingley examined the plans and observed that an expansion joint was required to fit within the 3½ inch space between the straps on Exhibit F. [R. T. 623, 1286-1287.] He did not know of any expansion joint which could fit in the designated space. [R. T. 623.] He asked Harland C. Jackson, the Harbor Department inspector, what was intended to be installed. Jackson said he would find out but did not give Tingley an answer. [R. T. 625.]

Sometime later, Tingley claimed he telephoned P. M. Squires, of the Harbor Engineer's design section and asked what type of expansion joint was intended; that Squires instructed that a Dresser style 38 coupling be used [R. T. 627, 629]; that at the same time, Jackson (the inspector) came into his office and laid on his desk a note which read: "Use Style 38 coupling" [R. T. 627-630.]

Squires denied instructing Tingley to use a Dresser style 38 coupling. [R. T. 1124.] He testified that after he had approved the original drawings Nos. 1-110-62 [Ex. DR], and 6-552-3 [Ex. DZ], the notation on the drawings regarding the expansion joints was added and he did not become aware that the plans

called for an expansion joint until after the casualty. [R. T. 1124, 1128.]

Jackson testified that he walked into Tingley's office and Tingley was talking on the telephone. [T. 523.] Tingley said he was talking to Squires; that Squires said to use a Style 38 coupling. Jackson wrote this on a piece of paper. [R. T. 525-528.]

A Style 38 Dresser coupling is similar to a style 40 coupling except that the sleeve is shorter. [R. T. 1578.] Tingley had never used a Style 38 coupling in a comparable situation [R. T. 1296], and he knew it was not normal procedure to put just one style 38 coupling in a line to take care of expansion. [R. T. 1296.]

Tingley knew that a Style 40 Dresser coupling was not an expansion joint, [R. T. 1297.] and that there was a difference between a dresser coupling and a true expansion joint. He had misgivings about using a Style 38 Dresser coupling. [R. T. 633, 1761.]

Tingley obtained and installed a Style 38 Dresser coupling in the pipeline. [C. T. 187.]

The contract specifications required that the line be tested to 400 pounds per square inch. [Ex. CA, Art. 167, p. 75; C. T. 187.]

On September 11, 1957, the line was pressure tested and separated from the coupling at 200 pounds per square inch. This was noted by Jackson in his daily inspection report. [Ex. N.]

The coupling was re-assembled by a Gerwick employee by welding two pair of anchor clips on the pipe on either side of the coupling, inserting rods through holes in the clips and tightening nuts on the rods. This

pulled the pipe back into the coupling. [R. T. 597, 655.]

The next day a second test was performed and the pipe line separated. This was reported by Jackson in his daily inspection report. [Ex. O.]

For the third test the coupling was again re-assembled, the threaded rods placed through the anchor clips and the nuts tightened, and left in place. [R. T. 1323.] In addition 4 inch by 4 inch timbers were wedged against the line at a point just after it made the first right angle turn between Bents Nos. 225-226 and the bent structure. [R. T. 600; C. T. 187.] The line held a pressure in excess of 400 pounds. [R. T. 508, 656; Ex. P.]

Tingley talked with Jackson, the Harbor Department inspector, about leaving the timbers and the anchor clips on the line [R. T. 1497], but Jackson said he would have to ask his superiors. Jackson later informed Tingley that A. R. Martin, the assistant Harbor Engineer, had said to take out everything but the bolt arrangement. Tingley consulted with Kenneth Sylvester, his superior, who said "That was not the way to do it. If they were to leave it, they should leave it all; and if they were going to take any of it out, they should take it all out". Tingley ordered that the blocking, anchor clips and bolts, be removed. [R. T. 1498.]

By a letter dated October 11, 1957, Tingley advised E. V. Dockweiler, the harbor engineer, that the blocking "necessary to pressure test the ten-inch oil line" had been removed, that A. R. Martin (the assistant Harbor Engineer) had agreed to install permanent blocking before the lines were put in to use, and that

permanent blocking is imperative to the safety of the operation of the line. [Ex. 16.]

Tingley testified that he discussed the letter personally both with Dockweiler and with Martin. [R. T. 1676-1679.] Dockweiler denied discussing the letter with Tingley. He testified he received the letter as routine correspondence and discussed it only with Martin [R. T. 584, 1224], that prior to July 11, 1957, he did not know that a device other than an expansion joint had been installed [R. T. 586], and he did not discuss with Martin the fact that the pipeline had separated during the tests. [R. T. 587.] Dockweiler further testified that in discussing the letter with Martin, Martin said that Gerwick wanted the Harbor Department to put a strong back on the line where it made two 90° turns. [R. T. 1227.] Dockweiler understood that Gerwick suggested bracing to prevent lateral movement of the line. [R. T. 1224.] This appeared to be a reasonable suggestion since the expansion and contraction of the pipeline could cause an eventual failure of the pipeline at one of the 90° bends. [R. T. 577-579.]

Dockweiler and Martin designed a device which harbor department personnel installed on Bent No. 225 in May, 1957. [Ex. R; C. T. 187.]

On November 1, 1956, Dockweiler wrote a letter to Bernard J. Caughlin, general manager of the Harbor Department, stating that Gerwick had fully and satisfactorily completed the work under the contract, except for certain paving, and had complied with the terms of the contract. This report was approved by the general manager and approved by the Board of Harbor Commissioners. [Ex. EC.]

On November 8, 1956, Kenneth Sylvester signed on behalf of Gerwick an amendment to Contract No. 1101 reciting that Gerwick, had, except for certain paving, completed the entire work provided in the contract. The amendment also provided that Gerwick was bound by all of the terms of the original contract except as modified by the amendment. [Ex. CB.]

Standard Oil maintained a 9600 foot long pipeline between its San Pedro Pumping station and the Matson Terminal. The pumps at the pumping plant could pump oil from the pumping station to the Matson Terminal, and could also withdraw oil from the line back toward the pumping plant. [C. T. 192.]

Standard supplied wharfside devices which were attached to the end of the riser on the lateral extending from the ten-inch oil line. A hose could be connected to the device and the vessel and oil pumped into the vessel. [C. T. 191.]

The Standard dockside crew was supplied with a telephone and maintained communication with the pumping station. The Standard dockside equipment included portable control equipment which could be attached to the communication line. The equipment also included a switch which automatically shut off the pumps at the pumping station when the line pressure at dockside reached 125 pounds per square inch. [C. T. 192.] Before each pumping operation, the line between the pumping station and Standard's dockside equipment was packed to a pressure of 125 pounds per square inch at which pressure the pumps at the pumping station were automatically shut off. [R. T. 758-759; 1969, 1990.]

The oil is heated at the pumping station to 135°F for passenger vessels and 150°F for cargo vessels. [R. T. 1096.] At atmospheric temperature, bunker oil has a consistency like "crisco" and is hard to move through the pipeline; however, it flows easily when heated to over 110°F. [R. T. 1104.] Whenever the line has not been used for several days the oil remaining in the line cools to atmospheric temperature. [R. T. 1971, 1972.] An initial pressure at the pumping station of between 200 and 250 pounds per square inch is acquired to displace the cool oil in the line. When the line warms up, the pumping plant pressure drops to about 190 pounds per square inch. At the Matson Terminal the initial dockside pressure may be as high as 85 pounds per square inch to bunker a cargo vessel and as low as five pounds per square inch when bunkering a passenger vessel after the line has become hot. [R. T. 1970-1971.]

The portion of the line south of Bent No. 184 had been used to bunker vessels since 1953, and that portion of the line between Bents Nos. 184 and 213 had been in use since 1954. [C. T. 193.]

Commencing on July 3, 1957, the Gerwick built portion of the pipeline (north of Bent No. 213) was used to bunker vessels. On July 3rd, 9,878 barrels were pumped through the line; on July 8th, 12,875 barrels and on July 9th, 12,488 barrels. [C. T. 194.]

On July 11, 1957, oil was pumped to the S.S. Lurline commencing at 10:00 A.M. By 12:20 P.M. at least 3,369 barrels of oil had been pumped through the line at the station, but only 1983 barrels had been received aboard the S.S. Lurline. Oil was discovered floating in the channel at about 12:10 P.M. and the pumps

at the pumping station were stopped at 12:20 P.M. [C. T. 188.]

Investigation disclosed that the pipeline had separated from the Dresser coupling and the oil had escaped at this point. [R. T. 982.] The oil spread from the point of discharge across the East channel and several thousand feet up and down the channel. [R. T. 1607, 1621; Ex. CS.]

At the time of the oil spill, Yacht Centre, Inc. occupied a water area pursuant to a lease granted by the Board of Harbor Commissioners. [Ex. 14.]

The oil spill was cleaned up by the City. [R. T. 1603-1604.] During the course of the clean-up operations, unidentified vessels burst through booms floating upon the water to confine the oil spread. This interference with the clean-up operations became so bad that the Port Warden requested the Coast Guard to furnish a patrol. [R. T. 1627.]

Ira Bechtold was an expert witness produced by the libellants at the trial. He testified that the Dresser style 38 coupling was not an expansion joint [R. T. 151-192, 215], nor could it serve the purpose of an expansion joint except to a limited degree [R. T. 215]; that the pipeline required an expansion joint [R. T. 220-222]; that it was good engineering practice to make calculations regarding the type of expansion joint required, but not a necessity [R. T. 223-338]; it was not good practice to brace the line to prevent it from separating from the coupling [R. T. 229]; it was improper to leave the coupling in place after the hydrostatic test failures [R. T. 223]; that it was not good engineering practice to use thrust blocking to conduct

the test [R. T. 225-236]; the substitution of the Dresser coupling for the expansion joint was responsible for the pipeline failure [R. T. 243]; there was no doubt an expansion joint was specified to be used on Drawing 6-552-3. [Ex. E; R. T. 326.] At least one expansion joint was required by the design of the pipeline [R. T. 333], and the place indicated on the plan [Ex. E], was not an improper place for an expansion joint [R. T. 334]; that the design of the line was not faulty assuming proper expansion joint had been specified [R. T. 335]; Exhibit F, the special pipe clamp, was inadequate to accommodate an expansion joint [R. T. 336], and was faulty. [R. T. 338.] His only criticism of Exhibit E, the pipe plan, was that it was skimpy. [R. T. 338.]

In case No. 18404 the court awarded costs as a proctor fee for the depositions of five witnesses who were present and testified at the trial and whose depositions were used for the purpose of refreshing recollection and cross-examination. [18404, R. T. p. 263.]

SPECIFICATIONS OF ERRORS.

1. The District Court erred by holding that the City of Los Angeles was liable to the libellants.
2. The District Court erred by holding that the City of Los Angeles was not entitled to indemnity or contribution from respondent Ben C. Gerwick, Inc.
3. The District Court erred by holding that the City of Los Angeles was not entitled to recover damages for its cleanup expenses from Ben C. Gerwick, Inc.
4. The District Court clearly erred in finding that the contract had been modified by duly authorized oral

executed alterations, additions, modifications, deviations and changes. [Finding 21, Cases 18404, p. 231; 18405, p. 52; 18407, p. 60; 18408, p. 60.] The error of this finding is that a written contract of the City of Los Angeles cannot be modified by oral executed agreements. Further, there is no finding regarding who made the oral modification or in what respects the "modifications" changed the contractor's obligation under the contract.

5. The court clearly erred in finding that the damage to libellants was proximately caused and contributed to by the negligence on the part of the City in failing to inspect, repair and warn them of the defective condition of the line. [Finding 26, Cases 18404, pp. 234-238; 18405, pp. 54-57; 18407, pp. 63-66; 18408, pp. 83-86.] This finding lists twenty specific acts of alleged negligence on the part of the City; however, they all support the proposition that the city owed to the libellant vessel owners a duty to maintain the underwharf pipeline in a good condition or warn them of its defective condition. The error in these findings is that there is no evidence that the vessel owners occupied a status which gave rise to a duty that the city inspect or repair the defective pipeline or warn them of its defective condition.

6. The District Court erred by taxing against the City the cost of the originals of four depositions.

7. The District Court erred by allowing proctor's docket fees for depositions of witnesses who were present and testified in court during the trial.

SUMMARY OF ARGUMENT.

These cases have two common aspects. First, the court awarded a decree in favor of the libellant vessel owners for damages caused by oil which escaped when an underwharf pipeline at Los Angeles Harbor separated and spilled onto the harbor waters. It is the position of the city that the City, as owner of the harbor and its waters, owed no duty to the vessel owners to inspect the pipeline, repair it, or give warning of its defective condition in the absence of a showing that the vessel owners occupied a status which required the City to do more than refrain from passive negligence. No evidence was offered by the libellant vessel owners regarding their status.

Second, the court denied the claim for indemnity and damages of the city against Gerwick, the contractor which built the wharf and installed the device which permitted the line to separate. Gerwick claims that the City personnel orally instructed it to install the device, and agreed to take precautions to safeguard the line. The City denies that the written obligations of a city contract can be so modified so as to relieve the contractor of his obligation to perform the work for which he is being paid.

ARGUMENT.

I.

The Libellant Vessel Owners Failed to Establish That They Occupied a Status Which Required That the City Inspect and Repair the Pipeline or Warn Them of Its Defective Condition.

A. The City Is the Owner of Los Angeles Harbor and Its Duty to Vessels Within the Harbor Is to Be Measured According to the Principles Applicable to Occupiers of Land.

The City of Los Angeles is the owner of Los Angeles Harbor and its covering waters. Statutes of California, 1929, Chap. 651. The administration of these lands and waters have been placed in a board of harbor commissioners. Charter of the City of Los Angeles, §138. The Board is given the power and duty to regulate the use of the lands and waters within the harbor and has done so by the adoption of Port of Los Angeles Tariff No. 3. Charter of the City of Los Angeles, §139(a); Exhibit D.B. Thus, the Board of Harbor Commissioners has prohibited persons, without permission of the Board, to use lands and waters under its jurisdiction (Tariff Item 1235), or to make vessels fast or moor them to wharves (Tariff Item 1250), or to buoys. (Tariff Item 1270.) Violation of these provisions is a misdemeanor. (Tariff, p. 50.)

The Board is also given the power to lease lands and waters within the harbor. Charter, §140. Pursuant to this power the Board has leased lands and water

areas to the appellee Yacht Centre, Inc. [Ex. 14.] The general manager of the department has granted preferential berth assignments to use wharves. Matson Terminals, Inc. occupied the Matson Terminal pursuant to this type of an arrangement. [Ex. CF.]

B. As an Occupier of Land, the City Has the Duty to Licensees to Refrain From Active Negligence, and the Duty to Invitees to Inspect, Repair and Warn of Defective Conditions on the Premises.

The City, as owner of the underwharf pipeline at the Matson Terminal, is governed by the principles applicable to occupiers of land with respect to persons coming onto the land or waters. In *The Santa Barbara* (1924), 299 Fed. 147 the court rejected a contention that a vessel damaged by fire was a licensee to which the wharfinger owed no duty except to refrain from wilful or wanton misconduct. The court found the vessel was an invitee to which the wharfinger owed a duty of due care. In *The Chancellor* (1929), 30 Fed. 227, the court acknowledged that a wharfinger owed no duty of care to an unforeseen vessel which was a trespasser.

In *Sullivan v. Shell Oil Company,* 234 F. 2d 733, the court observed at page 738:

> "The general rule in California is, that as to business guests or invitees, the owner occupier is 'obliged to keep the premises in a reasonably safe condition, or to warn * * * of danger.' The duty is not limited to conditions actually known * * * but extends also 'to conditions which

might have been found to be dangerous by the exercise of reasonable care.' * * *

"More accurately stated, the owner occupier must 'use reasonable care to keep his premises in a reasonably safe condition and give warning of latent or concealed perils.' "

And in *Chinca v. United States,* 190 Fed. Supp. 643 the Court observed as to the duty owed to licensees:

"Plaintiff, having lawfully come upon defendant's land for a non-business purpose of benefit only to himself, attained the status of a licensee. [Citations]. The numerous decisions of this state [California] dealing with the duty owed by landlords to persons coming onto their land as licensees have imposed upon said land owners the duty to refrain from active misconduct. [Citations]. There is presently no authority in this state for distinguishing between various classes of licensees, the overwhelming concensus being that the only duty owed to any licensee is to use ordinary care in conducting active operations. [Citations]. Defendant has admitted that the bridge in question suffered flood damage in December, 1955, and that defendants agent's knew of said damage and the resulting unsuitability of the bridge for use. But maintaining an unsafe bridge is clearly not active conduct; it is rather a condition of the premises which a licensee must take as he finds them. [Citations]."

C. Libellant Vessel Owners Failed to Introduce Evidence to Show They Occupied a Status Which Required That the City Inspect and Repair the Pipeline or Warn Them of Its Defective Condition.

The vessel owners had the burden of proof to establish that they occupied a status which required that the city do more than merely refrain from active negligence. *Martinez v. Southern Pac. Co.* (1955), 45 Cal. 2d 244, 288 P. 2d 868 (plaintiff had burden of establishing that he was automobile passenger, not a guest). In the absence of such a showing, the City owed libellant's no duty to inspect, repair or warn.

> "As the court stated in Routh v. Quinn, 20 Cal. 2d 488, 491 [127 p. 21], however, 'It is an elementary principle that an indispensable factor to liability founded upon negligence is the existence of a duty of care owed by the alleged wrongdoer to the person injured, or to a class of which he is a member.' * * *"
>
> *Richards v. Stanley,* 43 Cal. 2d 60, 63, 271 P. 2d 23.

In *Rexall Drug Company v. Nihill* (9thCCA, 1960), 276 2d 637, this court quoted with approval from *Spencer v. Beatty Safway Scaffold Co.,* 141 Cal. App. 2d 875, 881, 297 P. 2d 746.

> " 'The plaintiff in a tort action must establish the presence of every fact essential to his cause, especially that the negligence complained of war the proximate cause of the injury and nor mere speculation.' "

This the vessel owners have failed to do.

II.

By Failing to Construct the Underwharf Pipeline in Conformity With the City's Plans and Specifications, Ben C. Gerwick, Inc. Is Liable to the City for Its Damages Resulting From the Separation of the Defective Pipeline and for Indemnity.

A. The Contract, Plans and Specifications Could Not Be Altered by an Oral Executed Agreement.

The City's plans and specifications required Gerwick to install in the underwharf pipeline an expansion joint [Ex. E] and test the line to a pressure of 400 pounds per square inch. [Ex. CA, p. 75, Art. 167.] Contrary to the plans Gerwick installed in the pipeline a Dresser Style 38 Coupling, which is not an expansion joint, and used unapproved blocking to keep the line from separating while the pressure test was conducted.

The Court found that Gerwick had constructed the wharf in all respects in accordance with the contract, plans and specifications, and "duly authorized oral executed alterations, modifications, deviations and changes thereto." [Finding 21.] However, the court made no findings as to the identity of the person who was authorized to enter into an oral agreement on behalf of the City to modify the contract, plans, and specifications, nor did the court make any finding regarding what were the terms of the oral agreement, or in what respects the written contract was modified.

The only evidence regarding the modification of the plans to permit the substitution of a Dresser Style 38 Coupling for the specified expansion joint was the testimony of Max A. Tingley, Gerwick's project engineer. He testified that he had a telephone conversation with

P. M. Squires, chief of the design section of the Harbor Engineer's Office, who told him to use a Dresser Style 38 Coupling on the ten inch line, and, at the same time, Harland C. Jackson, a harbor department inspector showed him a slip of paper with the notation to use a Dresser Style 38 coupling.

There was no evidence of any nature of an agreement that Gerwick was relieved of the specification that the line as constructed hold a test pressure of 400 pounds per square inch.

The contract set forth the manner in which minor changes in the plans and specifications were to be effected.

> "The right is reserved to make such minor changes in the plans or specifications, as in the judgment of the engineer, may be necessary or expedient to carry out and complete more fully and more perfectly the work herein agreed to be done and performed. . . ." [Ex. CA, p. 15, Art. 31.]

Thus, the authority of the engineer was limited to *minor* changes which were necessary or expedient to carry out and complete more fully and more perfectly the work to be done under the contract. Whether the substitution of a Dresser Style 38 Coupling for the expansion joint indicated on plan 6-522-3 [Ex. E] was a minor or a major change is debatable; however, the substitution of the Dresser Style 38 coupling for the expansion joint was neither necessary nor expedient, nor did the substitution carry out and complete more fully and more perfectly the work agreed to be done and performed under the contract. To the contrary the substitution assured the eventual failure of the line

when it was placed in actual use for its intended purpose of bunkering vessels. Article 31 of the Gerwick contract also provided that the changes ordered by the Harbor Engineer were to be in writing, and

> "* * * no change or omission from the plans and specifications shall ever be held to have been authorized without written instructions signed by the Engineer." [Ex. CA, p. 15.]

Thus, the power of the engineer to make changes in the plans and specifications was quite limited. It could be exercised only where (1) the changes were minor, (2) the changes were necessary or expedient to carry out and complete more fully and more perfectly the work agreed to be done and performed; and (3) the instructions to make the changes were in writing and signed by the Harbor engineer. Any attempt by the engineer to make changes in the plans and specifications in a manner different from the foregoing requirements was ineffectual.

The authority of an engineer to order changes in a contract was discussed in *Hensler v. City of Los Angeles* (1954), 124 Cal. App. 2d 71, 268 P. 2d 12. In that case, acting under a contract provision similar to that in the Gerwick contract, the engineer ordered the deletion of certain work to be performed under the contract. Said the court:

> "The power vested in the engineer to effect changes in the quantities of the work is not so extensive as to enable him to abrogate or change the contract which the parties executed. [Citations], nor does it authorize defendant to employ such right to defeat the object of the contract which is reasonably deducible from its terms. The changes

> which may be ordered, when viewed against the background of the work described in the contract and the language used in the specifications, must clearly be directed either to the achievement of a more satisfactory improvement or the elimination of work not integrally necessary to the project. * * * the discretion committed to the engineer must be exercised within the framework of the contract and for the purpose of implementing the work originally intended."

In *The Wonder* (1935), 79 F. 2d 312, the City of New York employed a contractor to lay a cable in a trench along the bottom of a river bed pursuant to a government permit. The contractor did not lay the cables in a trench, but coiled them in a pile on the bed of the stream in such a manner as to constitute a hazard to navigation. The contractor claimed that the city engineer had authorized the contractor's manner of laying the cable. Said the court:

> "It may be contended that the city authorized the unlawful installation of the cables and hence is not in a position to enforce contribution." [The court then discussed the testimony of the contractor's representatives and witnesses from the city engineer's office.]
>
> "Such testimony is entirely insufficient to prove authorization by the city of an installation illegal in itself, because contrary to the terms of the government permit and in conflict with the written contract between the parties and the specific notice in the letter of the deputy commissioner on September 14, 1932, that whatever slack there might be in the cables 'should be laid in the trench. * * *'

> It is unthinkable that city engineers would have the power to modify a municipal contract in such a vital respect as is claimed by the subcontractor, and proof that they attempted to do so is lacking."

In *T. Kelly & Sons, Inc. v. Los Angeles* (1935,) 6 Cal. App. 2d 539, 45 P. 2d 233, the court remarked:

> "The generous declaration of the city engineer, who was not authorized to contract for the city, to the effect that because of hardship encountered plaintiff should be paid more than the contract provided, could not be construed as binding upon the city."

The court found that the Gerwick contract had been altered by an oral executed agreement; however, the only body in the city authorized to contract on behalf of the Harbor Department is its Board of Harbor Commissioners. Section 144 of the Charter of the City of Los Angeles provides:

> "The Board of Harbor Commissioners shall have power to order and contract for the expenditure of all money . . . in the harbor revenue fund. * * *"

Section 76 of the Charter provides:

> "The powers conferred by this charter upon each of the boards shall be exercised by order or resolution adopted by a majority of its members and recorded in the minutes with the ayes and noes at length. * * *"

Since the charter of the City directs that the Board of Harbor Commissioners exercise its power to contract by resolution or order, it is obvious that there can be no "oral" executed agreement binding the City.

The rule is stated in *Dynamic Ind. Co. v. City of Long Beach* (1958), 159 Cal. App. 2d 294, 298, 323 P. 2d 768:

> "It is well settled that when a municipal charter contains an express limitation upon the mode in which the city may contract, the city is bound only by contracts executed in accordance with the charter provisions; in other words, where the statute provides the only mode by which the power to contract shall be exercised, the mode is the measure of the power." [Citations.]

B. Ben C. Gerwick, Inc. Failed to Perform the Contract, Plans, and Specifications in a Workmanlike Manner.

The District Court found that Ben C. Gerwick performed the work required.

> ". . . in accordance with the said contract, plans, and specifications, and duly authorized oral executed alterations, additions, modifications, deviations and changes." [Finding 21.]

As discussed above, there could have been no oral alteration of the contract, executed or otherwise. Consequently, Gerwick's performance of the work in constructing the underwharf pipeline is to be measured according to the terms and conditions of the written contract and specifications. [Ex. CA and plans Exs. E and F.]

Regarding the pipeline, Exhibit E indicated that an expansion joint was to be installed on the line between bents Nos. 221 and 222; Gerwick did not install an expansion joint at that location. According to the specifications [Ex. CA, p. 75], the underwharf pipeline was to hold a pressure of 400 pounds per square inch; the pipeline did not hold a pressure of 400 pounds per

square inch without the aid of unapproved paraphernalia.

Exhibit F showed the details of a special pipe clamp which was to hold the expansion joint; however, the space between the clamps was much too small. There was a discrepancy between Exhibits E and Exhibit F.

The possibility of discrepancies between drawings was contemplated in the contract. Article 38 [Ex. CA, p. 16] provided:

> "* * * In any case of discrepancy in the figures or drawings, the matter shall be immediately submitted to the Engineer without whose decision said discrepancy shall not be adjusted by the Contractor, save only at his own risk and expense. * * *"

The contract gave to the Engineer the right to make minor changes in the plans or specifications necessary or expedient to carry out and complete more fully and more perfectly the work agreed to be done under the contract. [Ex. CA, Art. 38.]

Gerwick did not submit the discrepancy between the drawings on Exhibit E and Exhibit F to the Harbor Engineer and request written instructions signed by the harbor engineer; rather, Gerwick elected to proceed at its own risk and expense, by installing a coupling instead of an expansion joint. Expansion joints were well known in the industry and Gerwick was bound to ascertain whether the coupling it claimed it was instructed to use was in fact the proper device.

In *Ring Construction Company* (Ct. Cl., 1958), 162 Fed. Supp. 190, the specifications provided that in covering steel columns, the contractor could stop four inches

from the floor. It was common knowledge in the construction industry that columns should be completely covered so that they would not buckle in case of fire. The court said:

> "* * * we conclude that the plaintiff was required to carry the furring to the floor above, in spite of the omission in the specifications. A bidder should call attention to an obvious omission in a specification, and make certain that the omission was deliberate."

C. Gerwick Is Liable to the City on Its Express Agreement of Indemnity.

By Article 60 of the contract Gerwick agreed to indemnify the City for damages and costs sustained as a result of the use of improper methods or negligence of the contractor. By Article 87 it was agreed that the City would not be estopped after the acceptance of the work to show the true character of the work performed and that the work did not conform to the specification.

Construed together, these articles express the intention of the City and of Gerwick was that Gerwick would indemnify the City both before and after the contract was accepted for the damages resulting from any defective work.

The knowledge of the existence of a defective condition on the part of the indemnitee does not defeat his right to indemnification.

In *Safeway Stores, Inc. v. Massachusetts Bonding & Insurance Co.* (1962), 202 Cal. App. 2d 99, 20 Cal. Rptr. 820, the employer (indemnitee) of a contractor (indemnitor) knew that trusses installed in a building were defective. In *County of Los Angeles v. Cox*

Bros. Construction Co. (1961), 195 Cal. App. 2d 836, 16 Cal. Rptr. 250, the indemnitee was allowed to recover despite its negligence in failing to warn the public about a dangerous condition of the road. In *Pacific Telephone and Telegraph Company v. Chick* (1962), 202 Cal. App. 2d 708, 21 Cal. Rptr. 326, the indemnitee was allowed to recover against the contractor on a contract of indemnity after the indemnitee was held liable for personal injuries sustained when a vehicle ran into the pile of dirt on the road, although the indemnitee knew of its existence.

One of the leading California cases is *Harvey Machine Co. v. Hatzel, etc., Inc.,* 54 Cal. 2d 445, 6 Cal. Rptr. 284, 353 P. 2d 924. In holding that the owner of a building was entitled to recover indemnity from a contractor whose employee fell into an open pit. Said the court, page 448:

> "The situation here presented, where Harvey contracted for the complete construction of its plant and exacted from the defendants, and through them, from the subcontractors, hold harmless and indemnification clauses in the case of injuries to the defendants' employees, requires a realistic conclusion that the parties knowingly bargained for the very protection here in issue. Where, as in the case at bar the contractors, had practical control of the structures on the premises, any negligence for the condition of the structures would obviously not be that of the owner alone. The accident, in these circumstances, was one of the risks, if not the most obvious risk, against which Harvey sought to be covered."

D. Ben C. Gerwick, Inc. Is Liable to the City on an Implied Warranty That the Pipeline Constructed by It Shall Be Fit and Proper for Its Intended Purpose.

Ben C. Gerwick, Inc. was obligated by its contract to understand fully the requirement of the contract, plans and specifications, including the requirements for an expansion joint. Underlying every construction contract is an implied warranty that the contractor will faithfully perform it. In *Kuitems v. Covell* (1951), 104 Cal. App. 2d 482, 231 P. 2d 552, plaintiffs had employed defendant roofing contractors to furnish labor and materials for a covering on a roof that was practically flat. The defendants did not take adequate measures to provide for the drainage of the water from the roof. In upholding a judgment against the contractor the court said:

> "The following quotation from *Roscoe Moss Co. v. Jenkins,* 55 Cal. App. 2d. 369, 376 [130 p. 2d. 477] is applicable to the present situation: 'A general statement found in 38 Am. Jr. 662, section 20, reading as follows: "Accompanying every contract is a common-law duty to perform with care, skill, reasonable expedience, and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort as well as a breach of the contract." The rule which imposes this duty is of universal application as to all persons who by contract undertake professional or other business engagements requiring the exercise of care, skill and knowledge; the obligation is implied by law and need not be stated in the agreement . . .'"
>
> "The contract here under consideration involves a construction job and not a mere sale of roofing

material as appellants' brief seems to suggest. Obviously, the statement in the written contract that it contains the entire agreement of the parties cannot furnish the appellants an avenue of escape from the entirely reasonable obligation implied in all contracts to the effect that the work performed 'shall be fit and proper for its said intended use,' . . ."

In *Ryan Stevedoring Company v. Pan-Atlantic Steamship Corp.,* 350 U. S. 124, 76 S. Ct. 44, 100 L. Ed. 133, the court stated:

"The other question is whether, in the absence of an express agreement of indemnity, a stevedoring contractor is obligated to reimburse a shipowner for damages caused it 'by the contractor's improper stowage of cargo.

* * * * *

"The Shipowner here holds petitioner's uncontroverted agreement to perform all of the shipowner's stevedoring operations at the time and place where the cargo in question was loaded. That agreement necessarily includes petitioner's obligation not only to stow the pulp rolls, but to stow them properly and safely. This obligation * * * is of the essence of petitioner's stevedoring contract. It is petitioner's warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product. * * *

"Whatever may have been the respective obligations of the stevedoring contractor and of the shipowner to the injured longshoreman for proper storage of the cargo, it is clear that, as between themselves, the contractor, as the warrantor of its own

services, cannot use the shipowner's failure to discover and correct the contractor's own breach of warranty as a defense. Respondent's failure to discover and correct petitioner's own breach of contract cannot here excuse that breach."

These same considerations are applicable to the work performed by Gerwick under the contract. Gerwick was obligated to perform its obligations under the contract in a workmanlike manner. This Gerwick failed to do.

E. The City Is Entitled to Contribution From Gerwick in the Event the City Is Held Liable to the Libellants.

At the time Gerwick delivered the underwharf pipeline to the city, the pipeline contained a Dresser coupling instead of an expansion joint. Gerwick's superintendent, Tingley, was aware that the coupling was inadequate to serve as an expansion joint but believed that the line would not separate if it were blocked rigidly. Thus, Gerwick sought to absolve itself from liability for the inevitable consequences of the substitution of the coupling for the specified expansion joint by advising the city that the pipeline needed blocking.

A contractor is liable for damage resulting from the performance of public work either where he performs the work negligently or where the plans and specifications prepared by the public agency are inherently dangerous and the contractor knows or should have known that this was so. *Hamilton v. Harkins* (1956), 146 Cal. App. 2d 566, 573, 304 P. 2d 82. And likewise, where the contractor departs from the contract, plans, or specifications or goes beyond them, or performs the work planned and specified in an improper manner

which results in injury, he is responsible for the tort he has committed. *Marin Municipal Water Dist. v. Peninsula Paving Co.* (1939), 34 Cal. App. 2d 647, 652-653, 94 P. 2d 404. The liability of the contractor for his negligence continues after the work has been accepted. *Dow v. Holly Manufacturing Co.* (1958), 49 Cal. 2d 720, 321 P. 2d 736; *Hanna v. Fletcher* (1956), 231 F. 2d 469, 58 A. L. R. 2d 847. Annotation: 58 A. L. R. 2d 847, and he is not relieved of his liability for negligence because the intervening foreseeable negligence of a third person fails to correct the condition. *United States v. White* (1954), 211 F. 2d 79. Restatement, Torts, §452. He cannot escape liability for negligent acts which were the proximate cause of damages to others because another person's negligence was a contributing factor. *Westover v. City of Los Angeles,* 20 Cal. 2d 635, 128 P. 2d 350.

Thus, the failure of the City to replace the dresser coupling with an expansion joint or to block the line to prevent it from separating does not relieve Gerwick of liability for placing a faulty coupling in the line. It was foreseeable that the City might not install a blocking devise which would prevent the line from separating.

The city is entitled to contribution from Ben C. Gerwick, Inc. While it is true that in *Halcyon Lines v. Haenes Shipceiling & Refitting Corp.* (1952), 342 U. S. 282, 72 S. Ct. 277, 96 L. Ed. 318, the Supreme Court held that there was no right to contribution on non-collision admiralty cases involving injury to a third person, the admiralty courts frequently have borrowed from the states remedies which do not deprive the parties before it of a maritime right. The policy of the

court was stated in *Pope & Talbott, Inc. v. Hawn* (1953), 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143:

> "While states may sometimes supplement federal maritime policy, a state may not deprive a person of any substantial right as defined in any controlling acts of Congress or by intretive decision of this court."

In *Hess v. The United States* (1960), 361 U. S. 314, 80 S. Ct. 341, 4 L. Ed. 2d 305, the court explained:

> "Admiralty courts when invoked to protect rights rooted in state law, endeavor to determine the issues in accordance with substantive law of the State."

In 1957, the State of California added Section 875 to the Code of Civil Procedure. This section gives a right of contribution among joint tort feasors. This section gives a right of contribution among joint tort feasors. This is an additional right and may be properly invoked before a court of admiralty. The right of contribution in noncollision cases would implement the maritime law and would not deprive any joint tort feasor of any substantial admiralty right, and, of course, would be applied in an area where neither the court nor Congress has acted.

In *Augustus v. Bean* (1961), 56 Cal. 2d 270, 363 P. 2d 873, the California Supreme Court construed Section 875 of the Code of Civil Procedure as giving a right to contribution among joint tort feasors for torts committed prior to the enactment of Section 875 of the Code of Civil Procedure.

III.

In Case No. 18404, the Court Erroneously Allowed as Costs, Proctor's Fees for Depositions Not Introduced in Evidence at the Trial and Costs for Original Depositions.

In Case No. 18404, the court allowed proctor's fees for ten depositions, five of which were those of witnesses who were present and testified in court. These depositions were used for the purpose of refreshing the witnesses' recollection and were used in connection with their cross-examination. [C. T. 18404, 262-263, 264-265.]

A proctor's docket fee in the amount of $2.50 may be taxed as costs for each deposition admitted in evidence. 28 U. S. C. 1923. However, unless the witness is dead, out of the country, more than a hundred miles from the place where the court is setting or physically unable to appear in court, his deposition may not be used in the case. Revised Statutes, §865. Proctor's docket fees are not allowable for depositions not admitted in evidence. *Prashker v. Beech Aircraft Corporation* (D.C. Del., 1959), 24 F. R. D. 305.

Proctor's docket fees are allowable only for depositions de bene esse admitted in evidence.

The court also allowed Ben C. Gerwick, Inc. the cost of the originals of four depositions. [C. T. 18404, 264-265.]

28 U. S. C. 1925 provides:

> "Except as otherwise provided by Congress the allowance and taxation of costs in admiralty and maritime cases shall be prescribed by rules promulgated by the Supreme Court."

It is submitted that no act of Congress or rule promulgated by the Supreme Court allows as costs the expense of the original transcript of depositions.

Conclusion.

For the reasons set forth above, the decree of the court in each of the cases should be reversed.

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WALTER C. FOSTER

APPENDIX A.

Exhibits of Record.

Exhibit Number		Page of Reporter's Transcript Identified	Offered	Received
Libellant's	1	19	86	86
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	7	19	247	....
	8	19	247	....
	9	19	99	99
	10	19	99	99
	11	19	99	99
	12	19	99	101
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	B	19	104	....
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	F	19	105	105
	G	19	105	106
	H	19	106	106
	I	19	106	106
	J	19	106	106
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	L	20	107	107
	M	20	107	
	N	20	107	107
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	S	19	108	108
	T	19	109	109
	U	19	109	109
	V	19	109	....
	W	19	....	....
	X	19	109	109
	Y	19	110	110
	Z	19	111	111
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	AB	19	111	111
	AC	19	111	111
	AD	19	111	112
	AE	19	112	112

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AH	19	113	113
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AR	19	115	....
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AT	19	116	116
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BJ	19	120	120
BK	19	120	120

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CG	19	124	....
CH	19	125	125
CI	19	....	....
CJ	19	126	126
CK	19	126	126
CL	19	126	126
CM	19	126	126
CN	19	126	127
CO	19	....	....
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CQ	128	127	128
CR	128	128	128
CS	128	128	128
DA	19	128	....

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DM	145	145	....
DN	145	145	....
DO	145	145	....
DR	937	938	939
DS	937	938	939
DT	937	938	939
DU	1006	1006	1006
DY	1189	1230	1230
DZ	1189	1230	1230
EA	1416	1415	1416
EB	1654	1434	1654
EC	1655	1651	1655
EF	1781	1780	1781
EG	1906	1905	1906